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Supreme Court of the United States

October Term, 1935

No. 270

THE PRUDENCE COMPANY, INC.
Petitioner

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND AND AMERICAN BONDING COMPANY OF BALTIMORE

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents' brief entirely ignores the requirement of the Building Loan Agreement and the Surety Bond that the building be completed and ready for occupancy on a specific date, to-wit, December 16, 1930.

Respondents attempt to escape this specific obligation by lengthy references to immaterial facts as well as by inaccurate statements. They make no attempt to answer the cases cited in our brief (particularly on pages 33-36) which show that part of the damages for delay in completion have been generally recognized to include interest lost on the amount invested during the period of delay in completion.

In addition to this, Respondents ignore the express holding in *Kidd* v. *McCormick*, 83 N. Y. 391, 397, that:

> "And this is to be observed of the last-named kind of testimony" (viz. what it did in fact cost to finish the building up to the mark of the contract); "*first* that the plaintiff is not under obligation to go on and finish the house; *second*, that he cannot always finish it, as he could not in the case in hand, at the day called for by the contract, *when there will come into the damages the element* spoken of by Marvin, J., in 33 N. Y. (*supra*)* *of loss from delays;*"

Respondents' mistaken claim that the complaint does not allege interest, taxes and insurance premiums as damages by reason of the default under the surety bond, is contrary to the record.

The complaint pleads (R. p. 9-11) the entire condition of the surety bond, including Respondents' agreement to (R. p. 11)

> "make good any and every other default by the Principal in performing any of the other terms, covenants or conditions in said building loan agreement set forth by the Principal to be kept and performed up to and including the completion of and payment for said building * * *."

The complaint alleges (R. p. 13):

> "XXIII. The said Principal (Central Park Properties, Inc.) * * * failed to comply with said Building Loan Agreement * * *."

* *Morrell* v. *Irving Fire Ins. Co.*, 33 N. Y. 429.

The complaint also alleges (R. p. 15):

> "XXVI. Said Surety" (the two Respondents here) "has not made good the defaults on the part of the Principal (Central Park Properties, Inc.) hereinabove set forth, or any of them."

The complaint then alleges (R. p. 17):

> "XXXVII. By reason of the defaults of said Central Park Properties, Inc. and the defendants hereinabove set forth, this plaintiff has been damaged in the sum of Seven hundred eighty-eight thousand, six hundred seventy-six and 94/100 dollars ($788,676.94), with interest thereon as hereinafter set forth, in that"
>
> (Here follow seven specific items, including taxes, insurance premiums, and interest of which plaintiff alleges it "has been deprived" (R. p. 18) on the sum of $6,575,000.)

Thus is dispelled the mistaken notion set forth in Respondents' brief (pp. 20 and 21) that Petitioner's claim for interest, taxes and insurance premiums both as damages and by reason of default in the building loan agreement, has not been properly set up or claimed.

Respondents' "more complete statement of the case" is both wide of the mark and inaccurate.

Immaterial Statements

As instances of so-called statements of fact which are wide of the mark, we refer to the following:

1. Any detailed reference to the loan acceptance (Defendants' Exhibit A) is entirely immaterial, not only

because there are no statements in the loan acceptance which in any way support Respondents' extravagant claims, but also because such loan acceptance was merged (or to use the language of Respondents' counsel on the argument, "transmitted into contractual form") in the subsequently executed building loan agreement, which in turn is a part of the surety bond.

2. The fact that the Principal paid $4,000,000 for the land in 1928 is utterly immaterial. (See holding to that effect in *Mechanics Trust Co.* v. *Fidelity & Casualty Co.*, 304 Pa. 526).

Moreover, any attempt by Respondents to disassociate the land from the building or *vice versa* is an attempt to put Petitioner in the position of making a loan on land without building, which is just the opposite of what Petitioner required the Respondents to guarantee in this case. As a matter of fact, Respondents' emphasis on the amount paid for the land and the amount paid for the building shows that Petitioner was willing to lend only a portion of the Principal's actual cost of land and building, and that Petitioner insisted on a margin (equity) between the amount of its loan and the value of the property (with the building fully erected thereon) which was to be security therefor. Respondents' bond guaranteed that Petitioner should have that building and whatever margin of security that specific building, fully completed and ready for occupancy, would afford. In other words, Petitioner is the only one who could or can decide on the amount of security for its loan, and Respondents cannot escape liability under their bond on any claim that a different kind of security was just as good or should be sufficient.

3. The advances made by Petitioner of the full amount of the loan (viz., $6,650,000) and the application by Petitioner of $75,000 to reduce the mortgage principal, were entirely according to the building loan agreement. Respondents' statement at the head of page 4 with reference to how advances were to be made, omits the very material provision in the building loan agreement (R. p. 570) that "Said loan is to be advanced in such amount and at such times as Lender approves," and (R. p. 575) "Advances may be made as and when the Lender" (Petitioner) "or holder of the mortgage believes it advisable so to do, and all such advances or payments shall be deemed to have been made in pursuance of this agreement and not in modification thereof."

Not only was the reference to the 75% clause (to which Respondents have referred on p. 4) held to be immaterial in Judge BONDY's opinion (R. pp. 525-29) on motions directed to the sufficiency of the answers, but Respondents' assignments of error directed thereto were overruled by the Circuit Court of Appeals. Moreover, the Circuit Court of Appeals held that Respondents' claims with reference to the $75,000 which was applied by Petitioner to reduce its mortgage principal afforded no possible basis of defense on the part of Respondents. The language of the opinion is, "this defense therefore must fail" (R. p. 880).

4. Respondents' claim that Petitioner did not make any claim for interest before the completion of the building is utterly immaterial because, obviously, Petitioner could make no claim for interest until it knew the length of time it had lost interest on its investment.

5. The reference by Respondents to notices given them by Petitioner with respect to defaults is immaterial, because there is no question in this case but that notices were properly given as soon as Petitioner learned of the defaults.

Inaccurate Statements

1. At page 4 Respondents make the inaccurate statement that there was "an explicit understanding that a great part of the principal of the loan would be satisfactorily secured by the land alone which had cost the Principal $4,000,000 (R. p. 798) and that the building would be security for only part of the loan."

Not only is the above statement without the slightest foundation, but it is fundamentally and absolutely inaccurate.

The reference made by Respondents to page 798 of the record is to a statement in the loan acceptance that the acceptance by Petitioner of the loan is, at Petitioner's "option, conditional upon the following representations made by" the Principal, including the statement that the Principal paid $4,000,000 for the land in the year 1928.

The outstanding fact, however, is that Petitioner would *not* make this loan, or even any advance thereon, unless it had Respondents' surety bond both guaranteeing that *the* building would be fully completed and erected on the land on or before December 16, 1930,—and that, too, in strict accordance with the plans and specifications,—and also agreeing to indemnify the Petitioner for any default of the Principal in performing the obligations of the building loan agreement. In other words, the land without the completed building, constituted no security and until the

building was completed Respondents guaranteed performance by the Principal of all the covenants of the Building Loan Agreement.

2. On page 9, Respondents make the statement that "$6,000,000 was bid and paid for the property on the foreclosure sale," and then follow with the statement that "Petitioner, instead of investing that $6,000,000 in some other manner, re-invested in this particular property."

Advisedly, we here state that there is no excuse for such inaccurate statements.

On the trial Respondents offered in evidence (R. p. 314), Paragraph XXXIX of the complaint, with this statement by Respondents' counsel:

> "Mr. Murray: Then I shall offer in evidence Paragraph XXXIX of the complaint, which gives the facts as to the foreclosure of the mortgage and the sale upon said foreclosure."

Paragraph XXXIX of the complaint specifically states that Petitioner "caused the mortgage • • • to be foreclosed," and that the plaintiff in the foreclosure action "represented and was a nominee of" this Petitioner, and that the mortgaged premises "were sold to a nominee of this plaintiff" (Petitioner) "for Six million dollars ($6,000,000)." It therefore conclusively appears by evidence which the Respondents themselves offered on the trial that this $6,000,000 was Petitioner's own money, and was never actually paid to Petitioner for the land and building, and of course was never available for reinvestment (as erroneously repeated at page 31 of Respondents' brief), but always remained tied up in this building, where it

had been invested on the strength of Respondents' surety bond.

Thus is shown the absolute inaccuracy of the above statement by the Respondents.

3. Respondents, in their attempt to whittle away their liability under this bond, repeatedly refer to descriptions of the bond contained in the Building Loan Agreement and in the recitals of the surety bond itself, but each of these references omits a material part of the description of this surety bond, namely, that such surety bond was (R. pp. 578, 594) "to be in form and contents satisfactory to" Petitioner.

It is because the surety bond contained, among other provisions, the provision that obligated these Respondents to "make good any and every * * * default by the Principal in performing any of the * * * terms, covenants or conditions in said building loan agreement set forth by the Principal to be kept and performed up to and including the completion of and payment for said building," that Petitioner accepted that bond and made this building loan.

In other words, the provisions of the bond itself—and not any attempted short description thereof—, must control in deciding what the obligations of the bond actually are.

4. Respondents' statement on page 10 that "four months was consumed in making" alterations in the building "to suit Petitioner's fancy" is also flatly contradicted by the record. Although Respondents refer (p. 31 of their brief) to an answer of Petitioner's witness, Mr. Lukach, on cross examination, the fact is that Mr. Lukach

testified unequivocally (R. pp. 309-310) that the work of completion did not stop while alterations were going on but that the completion and any alterations which were made "were going along *pari passu.*"

Any reference by Respondents to changes which Petitioner made in the plans and specifications after Petitioner itself had commenced the completion, is also utterly immaterial because not only did Petitioner have the right to make changes under the surety bond (R. pp. 602-3), but also as affirmatively held in *Kidd* v. *McCormick* and in *Board of Education* v. *Maryland Casualty Co.*, 27 F. (2d) 20, 21 (C. C. A. 3) Petitioner was not required to complete the building in accordance with the plans and specifications.

5. The statement at page 9 of Respondents' brief that "part of the building was actually tenanted in August, 1931," is not supported by the portion of the record referred to and is contrary to the actual fact. (Respondents have never before made any such claim.) It is natural that one who has rented quarters for occupancy on October 1, will make arrangements before then to have them altered to suit his needs, and it is also natural to refer to such a person as a tenant of certain quarters, even though he is not in possession thereof. All that Mr. Zilber's testimony on page 480 means is that a dentist who had rented a room in the building, on a lease to begin October 1, 1931, wanted to have it altered in advance so that it might be suitable for his occupancy when his lease began. There is no evidence of any agreement to pay rent before Ocotber 1, 1931, and, in fact, there was no such agreement.

6. On page 11, Respondents state there is absolutely no foundation for the statement in the second note on page 7 of Petitioner's brief "that the omissions and substitutions detracted from the value of the building" and that the pages which we have cited contain no evidence that the value of the building was lessened.

Although it was unnecessary for Petitioner to prove that the omissions and substitutions which were deliberately and secretly made detracted from the value of the building, since Petitioner was entitled to *the* building and not *a* building, we point out also that the above mentioned statement by Respondents is erroneous; the citations of the record which we have made on page 7 of our brief conclusively show the respects in which each specific omission or substitution which was in any way contested by Respondents at the trial detracted from the efficient operation, appearance, or value of the building.

7. The statement on page 26 of Respondents' brief that the Petitioner has failed to call the Court's attention to the whole of the provision relied upon with respect to payment of taxes is erroneous, and inexcusably so. Petitioner quoted (Brief p. 52) a portion of the covenant in the building loan agreement, by which the Respondents guaranteed that the building to be erected should be "free and clear of all liens and encumbrances" (R. p. 568). The quotation which Respondents make (Brief p. 26) is from a portion of the condition of the Surety Bond (R. p. 596), on which we did not rely and which does not purport to, and could not, limit the specific obligation of the covenant just quoted. We have used the word "inexcusably" advisedly, because Respondents made this same claim in their brief in opposition to our application to this Court for certiorari and in our reply brief (p. 6), we specifically called attention to their mistake.

I

Plaintiff's right to recover the item of interest awarded by the trial court was not affected by its foreclosure of its mortgage.

(Replying to Respondents' Point IV)

Respondents' attempt to defeat the item of interest as an element of damage on the ground that "the status of Petitioner as mortgagee ceased" when the judgment of foreclosure and sale was entered "and the mortgage debt was *ipso facto* merged in the judgment," must fail on many grounds.

1. In the first place, the item of interest included in the judgment is interest lost on Petitioner's *investment* of $6,575,000; and the loss of interest thereon did not cease to exist, as erroneously claimed by Respondents.

Furthermore, in *Kidd* v. *McCormick* (83 N. Y. 391) there had been a foreclosure, and the property was bought in by the plaintiff himself; notwithstanding that, the New York Court of Appeals held that interest on plaintiff's own mortgages, and the amount he had to pay for taxes and insurance premiums, were items of loss which must be considered. (See also *Province Securities Corp.* v. *Maryland Casualty Co.*, 269 Mass. 75; *Mechanics Trust Co.* v. *Fidelity & Casualty Co.*, 304 Pa. 526.)

We have already shown that Petitioner itself bought in the property on the foreclosure. Any attempt, therefore,

to show that Petitioner did not lose interest on $6,575,000 from December 16, 1930, to October 1, 1931, is an attempt to substitute form for substance, and ignores the undisputed fact that Petitioner *did* lose interest on its investment of that amount in cash.

The $6,000,000 for which the building was "sold" on foreclosure was Petitioner's money. The loss of interest thereon is just as much an item of damage, whether the $6,000,000 be viewed as an involuntary investment in an incompleted building, or as still apart of the amount advanced under the mortgage loan.

2. This action is against the Respondents on their surety bond, and not against the maker of, or on, the bond and mortgage. The obligation of the Respondents to reimburse Petitioner for the interest arises out of and is *contained in Respondents' surety bond.*

There was no merger of the surety bond in any judgment.

The only judgment in which Respondents' obligation is merged is the judgment in this case, which is the subject of this review.

The change in relations between Petitioner and the Principal through foreclosure of the mortgage after the Principal's default has no effect upon the relation between Petitioner and Respondents under their bond, or on the nature of the rights which that bond was intended to protect.

3. Respondents' surety bond specifically provides (R. p. 605):

> "All remedies afforded to the Obligee hereunder are *cumulative* and shall be construed as not limit-

ing or prejudicing *any other legal or equitable remedy* which the Obligee may have in the premises."

Quite aside from the fact that the Petitioner's investment remained tied up and frozen after the foreclosure sale and bidding in of the property by Petitioner's nominee, the italicized portion of the above quoted provision of the Respondents' surety bond certainly prevents the Respondents from even attempting to raise any such technical point as here advanced. In other words, Petitioner has recourse against Respondents in addition to ("cumulative" to) the foreclosure of its mortgage.

4. The judgment on which Respondents base their argument is a deficiency judgment entered April 30, 1931, for $716,215.02. If that judgment took the place of Respondents' obligation, then the judgment against Respondents in this action would have been very much more than it is.

II

The rule of difference between the value of the uncompleted building and its value if it had been completed in accordance with plans and specifications, does not prevent recovery of interest, taxes and insurance premiums.

(Replying to Respondents' Point I)

Respondents' Point I is sufficiently answered by the holding in *Kidd* v. *McCormick,* which we have quoted at

page 2 of this reply brief, and Respondents unite with us in stating that that case is controlling here. The quotation so made immediately follows the third type of evidence to which Respondents refer at the foot of page 15 of their brief.

In other words, *Kidd* v. *McCormick* is direct authority for recovery by Petitioner of loss from delays and as shown by the cases cited at pages 33-36 of our main brief, such loss from delays is properly measured by interest, taxes and insurance premiums.

The difference in value to be attributed to the omissions and substitutions is not to be proved only by expert testimony which compares the value of the entire building if completed in strict accordance with the plans and specifications, and the value as it was with items omitted and inferior items substituted. The proof actually introduced by Petitioner showing the reasonable cost of supplying omissions and the difference in value of each inferior item substituted for items called for by the plans and specifications is the best evidence of the damages suffered by Petitioner from failure to furnish *the* building guaranteed; that is to say, from failure to comply with the plans and specifications in respect to the omissions and inferior substitutions.

This must necessarily follow because Petitioner was entitled to *the* building guaranteed by the surety bond in this case and not *a* building. For this reason it is equally clear that it is not open to Respondents or any real estate expert or a jury or even the court to say that a different building offered security just as good or of equivalent value as that which was guaranteed to Petitioner. In other words, Petitioner is the only one who

can decide upon the *kind of security* it desires for its loan and, therefore, if the specific building guaranteed by the surety bond is not furnished, any assertion that a building with omissions and substitutions was just as good or almost as valuable cannot deprive Petitioner of the security for which it bargained, and upon which it insisted. It follows, therefore, that any proof—if it had been offered—of so-called difference in value of the entire building with and without the omissions and inferior substitutions, which ignores the actual proved value of those omissions and substitutions, could not deprive Petitioner of its loss by reason of not being given the guaranteed security.

III

With reference to *Kidd* v. *McCormick* and *Trainor* v. *Aetna Casualty Co.*

(Replying to Respondents' Point II)

The error of Respondents' counsel in stating on page 18 of their brief that "nowhere in the opinion in *Kidd* v. *McCormick*, was it even hinted that interest, taxes and insurance premiums could be recovered as such" is clearly shown by the following quotation from the opinion in *Kidd* v. *McCormick* (83 N. Y. at 398):

> "It is plain that to repay him just what he expended to finish the buildings would not make him whole; for he had to pay, besides the cost of building, interest to Granniss" (first mortgagee) "*and lose interest on his own mortgages, and pay taxes and premiums.*"

We have already shown in our main brief (p. 24) that the fact that the plaintiff in *Trainor* v. *Aetna Casualty Co.* (290 U. S. 47), was a third mortgage is no ground of dictinction, as now claimed by Respondents (p. 19 of their brief).

IV

Both under the terms of respondents' bond and under the law of damages, petitioner is entitled to interest, taxes and insurance premiums.

(Replying to Respondents' Point III)

A

With Reference to The Terms of The Bond:

(Replying to "A" in Respondents' Brief)

The inherent difficulty in Respondents' position in this case is shown by the claim they are forced to make, namely, that their bond is "a naked completion bond and nothing but a completion bond."

That this bond is very much more than a completion bond is apparent from a reading of its provisions.

The argument contained in Respondents' brief that Petitioner's complaint did not claim interest as a contract obligation has already been answered in this reply brief (*supra*, p. 2).

There is no foundation for the claim that "petitioner's own prior practical interpretation of the instru-

ments" defeats its right to recover interest, taxes and insurance premiums or that the Petitioner's conduct is inconsistent with the demand for interest, taxes and insurance premiums. As shown on the argument, the letters and notices forwarded to Respondents in the Spring of 1931 were not statements of cost of completion already paid, but were lists of items remaining to be completed or corrected, together with estimates of the expense for labor and materials which would be required to complete or correct them. The amount of damages which Petitioner would suffer by loss of interest, taxes and insurance premiums during the period of completion was not yet determined and could not then have been stated, nor would such statements be appropriate parts of such letters or notices. Petitioner could not know until October 1, 1931, when the building was fully completed, what was the full measure of its loss from delay.

Nor can any reference by Respondents to the terms of the guaranty given by Mr. Lefcourt assist Respondents in cutting down the obligations contained in their surety bond. In the first place, any real security to Petitioner was taken away from Mr. Lefcourt's guaranty by the express limitation which was inserted in the regular printed form, viz. (R. p. 681):

> "Anything contained herein to the contrary notwithstanding, the obligation of the undersigned under this guarantee shall cease and this guarantee shall become null and void when the Municipal and/or State Departments having jurisdiction have issued the customary certificates of occupancy."

It is conceded in this case that "the customary certificate of occupancy" is not a certificate of completion (R. pp. 494, 879).

The certificate of occupancy was issued October 3, 1930. Therefore, Mr. Lefcourt's guaranty was null and void long before the first date on which Respondents could be called upon to make good on their bond.

In the second place, Mr. Lefcourt's guaranty was not written in the form of a bond with condition, and the form and approach thereto were, therefore, entirely different. Two different draftsmen may very well arrive at the same result in different types of instrument by different form and different language.

Respondents, in referring to the description of the surety bond as contained in the building loan agreement and the recital in the surety bond itself, repeatedly omit the words contained in such description, to wit, "in form and contents satisfactory to the Lender."

That Respondents' counsel themselves understood the building loan agreement to obligate the Principal to pay interest on Petitioner's loan is shown by the following quotation from page 26 of their brief in the Circuit Court of Appeals:

> "From the instrument which evidenced the relations between plaintiff and Central Park Properties, Inc. (Building Loan Agreement, Plaintiff's Exhibit 1), it is perfectly clear that the latter *assumed two separate* obligations; first, the repayment of the principal of a loan in the sum of $6,650,000 *with interest;* second, the construction and completion of a building in accordance with the terms of the building loan agreement and plans and specifications." (Italics added.)

It follows, therefore, that Respondents' bond was more than a guaranty only of completion of the building.

Nor will the argument of Respondents' counsel that our demonstration of how the surety bond itself expressly obligates Respondents to pay interest is "too fine-spun" bear analysis. On the contrary, we believe it as simple as A B C.

Let A equal the surety bond, which guarantees that Respondents "shall make good any and every other default by the Principal in performing any of the other terms, covenants or conditions in said building loan agreement set forth by the Principal to be kept and performed up to and including the completion of and payment for said building" (R. pp. 596-7).

Let B equal the building loan agreement which is referred to in A and which is made part of A, by which building loan agreement the Principal agreed "to perform and comply with all and every of the covenants, terms and conditions herein and in said bond and mortgage contained" (R. p. 568), and by which building loan agreement it was provided that the bond and mortgage just referred to were to be the bond and mortgage *of* the Principal (R. p. 568), and that such bond and mortgage should obligate the Principal to pay interest at the rate of 6% per annum on the full amount of the loan on December 16, 1930, and quarter-annually thereafter (R. pp. 569-70), and in which building loan agreement the Principal also agreed that "Interest on the full principal amount" ($6,650,000) "shall run from the date herein fixed for completion (whether or not the building be completed on said date)" (R. p. 570).

Let C equal the obligation to pay interest.

Since A includes B and B includes C, it must follow that A includes C.

B

With Reference to Recovery of Interest as Damages

(Replying to "B" in Respondents' Brief)

Respondents' argument that the authorities forbid the allowance of interest against a party who is not liable for the principal is completely answered by the cases cited at pages 33 to 36 of our main brief.

In addition to the quotation from *Wood* v. *Joliet Gas Light Co.*, 111 Fed. 463, contained on page 35 of our main brief, we called attention on the argument to the language of this court in *New York &c. Mining Co.* v. *Fraser*, 130 U. S. 611, at page 622, where this court expressly held that in the absence of evidence of rental value interest on the investment can be taken as the measure of damages caused by delay.

Hamilton v. *Rensselaer*, 43 N. Y. 244, which now seems to be the main reliance of Respondents in this respect, is clearly not in point. In that case there was an express guaranty of interest, but not of principal, up to a specified time. The court held that the guarantor was not liable for interest beyond the specified time. In this case, the specified time was the actual completion of the building and the Petitioner has neither asked for nor been allowed interest as damages beyond that date.

C

(Replying to "C" in Respondents' Brief)

Respondents' claim that there is no causal relation between loss of interest, taxes and insurance premiums and failure to complete the building is, we submit, negatived by this court's use of the words "in respect of its debt" in *Trainor* v. *Aetna Casualty Co.*

We have already shown (*supra*, p. 7) the error of Respondents' statement (p. 31 of their brief) that Petitioner's own witness testified that four months were spent in making alterations in the building, and that the notion that "$6,000,000 worth of principal" was "available" to Petitioner "for investment," is entirely erroneous. We have also shown that the building was not tenanted in August, 1931.

For defendants to argue that failure to complete the building was not a direct, natural or proximate cause of the loss of interest is a legal quibble without foundation or substance. The fact that a default by the principal debtor in repaying the loan and the interest thereon would have to concur with the default in prompt completion, is clearly no defense to the liability of these Respondents as sureties. The very purpose of the surety bond was to protect Petitioner from the consequences of the principal's failure to perform its obligation to pay principal and interest on the loan advanced by Petitioner. In case of negligence the fact that an intervening act of a third person is itself negligent does not make it a superseding cause if a reasonable man would not regard such intervening act as

extraordinary (Torts Restatement, Section 447). The same rule applies here; and certainly no sensible person can argue that the failure of Petitioner to receive money to cover interest was an extraordinary intervening act after the default in completion on the date guaranteed.

This same argument was answered in *Kidd* v. *McCormick*, where defendants sought to claim that the fund in suit was to guarantee only completion, and not payment of the mortgages. The court stated (83 N. Y. at 398):

> "The appellants claim that the trust fund was not a collateral to the plaintiff's mortgages. It is true that it was not made so in direct terms, but it was collateral that the houses would be built; and as that could not be without helping the security of the plaintiff's mortgages indirectly, the trust fund operated as collateral to the mortgages."

And see *O'Brien* v. *Illinois Surety Co.*, 203 Fed. 436 (C. C. A. '6), quoted at pages 39-40 of our main brief.

Respondents rely very largely in their brief on two cases, each of which are cited three times, viz.: *Province Securities Corp.* v. *Maryland Casualty Co.*, 269 Mass. 75 and *United Real Estate Company* v. *McDonald*, 140 Mo. 605. The first case was cited by the sureties in the *Trainor* case and rejected by this court as contrary to reason and the weight of authority; the second was cited by the plaintiff in the *Trainor* case (See his brief, pp. 16-17) only on the point of the difference between a bond of guaranty and a bond of indemnity (the bond in this suit is one both of guaranty and indemnity); and its citation by this court in the *Trainor* case cannot be construed as

approving the inference which Respondents now seek to draw from it (even, assuming, contrary to what we consider to be the case,—see *Illinois Surety Co.* v. *Davis Co.*, 244 U. S. 376, 381—that this court would be at liberty to reject the New York rule of damages). Moreover, the attitude of the Missouri court with reference to damages due to delay is shown by the later case of *Smyth Realty Co.* v. *American Surety Co.*, 292 Mo. 423, where, under a bond that a lessee would complete a building within a specified time, the court held that the building was to constitute additional security for the rent accruing (together with taxes and insurance) and, $28,000 of rent having accrued, and the building (which was to have cost $110,000) not having been built, it granted judgment for the full amount of the bond ($25,000).

Since it was the purpose of the surety bond to guarantee a building which would provide for the payment of taxes, interest and insurance, those items constitute, as held in *New York Mining &c. Co.* v. *Fraser*, 130 U. S. 611 (*supra*), at least the prima facie measure of Petitioner's damages by delay in completion. It is not open to respondents, without having offered any proof on the subject, to argue that the contemplation of the parties in this respect must have been defeated, and that an alternative measure of damages which they did not suggest to the trial court, namely, rental value, would result in an award of less than what the trial court found had been contemplated and proved; they cannot thus easily escape the penalty of their bond, when Petitioner's actual loss is beyond question.

V

The amount awarded to petitioner as damages by reason of omissions and inferior substitutions cannot be reduced by what experts might testify to be the difference in value between a building with and without such omissions and inferior substitutions.

(Replying to Respondents' Point V)

We have already corrected (*supra,* p. 10) the mistaken assertion by Respondents that there was no evidence of lessening in value by reason of the material omissions and substitutions of which the Principal was guilty.

Since Respondents guaranteed (among other obligations) the completion of *the* and not *a* building, it would not in any event be open to the Respondents to claim (by some experts testifying to little or no difference in value)* that the building, with items called for by the specifications omitted, or inferior materials substituted, was just as good and should be just as satisfactory a security to this Petitioner as the building which was guaranteed to be erected. In other words, it is not open to someone else to say what kind of security Petitioner should have for its mortgage.

Moreover, Petitioner's proof met the test of *Jacob & Youngs* v. *Kent,* 230 N. Y. 239, cited at page 36 of Respondents' brief. That case stated that "in most cases

* Much less may they now argue that it was proved by the testimony of the very men who, in violation of the building loan agreement, and over the protests of the architect, insisted on such departures from the plans and specifications.

the cost of replacement is the measure * * * unless the cost of completion is grossly and unfairly out of proportion to the good to be obtained. When that is true, the measure is the difference in value." In that case, the only difference from the specifications was the use of wrought iron pipe manufactured in Cohoes instead of wrought iron pipe of the same description and quality manufactured in Reading; it was an extreme case on facts peculiar to that case on which the court held that there had been substantial performance.

An examination of Plaintiff's Exhibit 85 (pp. 763-66) will show how substantial and material were the omissions and substitutions which are included in the judgment in this case.

In the present case Petitioner proved the cost of supplying omissions only in cases where items called for by the plans and specifications had been completely omitted. In cases of inferior substitutions it proved the difference in value between the item called for by the plans and specifications and the item supplied. For example, where terrazzo, a composition of marble dust, cement and sand (R. p. 182), was substituted for marble, Petitioner gave Respondents the benefit of the doubt, and, although it might well have been entitled to the entire cost of removal and replacement for such a material substitution, particularly where—as in this case—the variation was intentional (*Turner* v. *Henning,* 262 Fed. 637), it claimed, and was allowed, only the difference in value between terrazzo and marble (R. pp. 236, 765).

CONCLUSION

The decree of the Circuit Court of Appeals should be reversed or modified so as to embody a direction that interest on Petitioner's investment between the date on which the building should have been completed and the date on which it was actually completed, and also taxes and insurance premiums paid during such period, be included as items of damage, and also that if a new trial is to be had, the issue on such new trial be limited to the issue of effectiveness of any alleged waiver and the reasonable value of the omissions or substitutions, if any, which were effectively consented to.

New York, January 11, 1936.

Respectfully submitted,

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